A

SIA SWEE SIONG v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
HARMINDAR SINGH DHALIWAL JCA
AB KARIM AB JALIL JCA
B [CRIMINAL APPEAL NO: M-05(M)-241-06-2016]
19 APRIL 2017

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Trafficking in dangerous drugs – Presumption of trafficking – Drugs found concealed*
C *in rented car – Whether accused person had knowledge of presence of drugs – Whether knowledge of presence of drugs could be inferred based on facts of case – Whether possession had been proved – Whether mere custody and control sufficient to prove possession – Whether case of possession or trafficking – Whether there was overt act – Dangerous Drugs Act 1952, ss. 12(2), 37, 39A(2) & 39B(1)(a)*

D

The appellant was detained in a car by the police and brought to the police station. An examination of the car led to the discovery of 138.77g of methamphetamine in the speaker box. The appellant was accordingly charged at the High Court for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Satisfied that the
E prosecution had successfully proved, against the appellant, (i) the element of possession and knowledge of the drugs without invoking the presumption under s. 37(d) of the Act; and (ii) trafficking with the aid of the presumption under s. 37(da) of the Act, the appellant was called to enter his defence. In his defence, the appellant submitted that he rented the car as he was going
F to Kuala Lumpur to see one Mr Goh. At the conclusion of the trial, the High Court Judge ('HCJ') held that the appellant failed (i) to cast a reasonable doubt on the prosecution's case; and (ii) to rebut the presumption of trafficking under s. 37(da) of the Act. The appellant was therefore, convicted and sentenced to death. Hence the present appeal. The crucial issue that arose
G for the court's adjudication was whether possession had been proved and whether on evidence, at its highest, it was a case of possession and not trafficking. The appellant contended that (i) the HCJ inferred knowledge of the presence of drugs based on the fact that there was no evidence that others had access to the car; and (ii) knowledge could not be inferred as (a) there
H was no evidence that it was the appellant who kept the speaker box in the car; (b) no forensic evidence was adduced, *ie*, DNA or fingerprints liftings, to suggest that the appellant had come into physical contact with the contents inside the speaker box; and (c) the packages of drugs were hidden from the naked eye in that they were concealed in the speaker box.

I

Held (allowing appeal)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) Mere custody and control are not sufficient to prove possession under the Act. There must be proof that the appellant had knowledge of the drugs. Unless the appellant confessed to knowledge of the drugs, knowledge could only be inferred from proved facts and circumstances. What constitutes possession under the Act is a question of law. However, whether possession has been proved in a given case is a question of fact. (para 16)

(2) The drugs were hidden in a speaker box and some effort would be required to open up the box to determine what was inside it. As such, the more appropriate way to impute knowledge was through the use of the presumption under s. 37(d) of the Act. However, there was no factual matrix adduced by the prosecution to infer that the appellant had knowledge of the drugs in the speaker box. The HCJ erred in finding that the appellant had knowledge of the drugs by way of inferences and from the circumstances of the case. (paras 22 & 23)

(3) The HCJ took the view that in cases where the presumption of trafficking is applied, no overt act is needed to be proved. To the contrary, overt act would be looked into even when the presumption under s. 37(da) of the Act had been invoked. The presence of overt act is always relevant when considering the issue of trafficking. The requirement of an overt act to constitute trafficking is consistent with the definition of 'trafficking' in s. 2 of the Act which is very wide. Whether there is an overt act which goes beyond passive possession depends on the facts and circumstances of a particular case. In this case, the facts and circumstances reveal no overt act on the part of the appellant. The primary facts showed that the appellant was merely seated in the car when he was arrested; there was nothing beyond that. There was no conduct of flight of attempted flight, struggle or attempted bribe. The amount of drugs involved was not unusually large. In short, there was no overt act to show trafficking. (paras 25, 27, 28 & 32)

(4) The HCJ ought to have invoked the presumption under s. 37(d) of the Act and called upon the appellant to enter his defence only on an amended charge of possession under s. 12(2) of the Act and not trafficking. Consequently, the presumption of trafficking could no longer be relied upon to prove trafficking. In any event, there was only evidence of passive possession on the part of the appellant. Considering the entirety of the evidence, the appellant failed, on a balance of probability, to rebut the presumption of possession and knowledge. The conviction and death sentence of the High Court was set aside and substituted with a conviction under s. 12(2), punishable under s. 39A(2) of the Act. The appellant was sentenced to 20 years' imprisonment and ten strokes of whipping. (paras 33 & 34)

Bahasa Malaysia *Headnotes*

Perayu ditahan oleh pihak polis di dalam sebuah kereta dan dibawa ke balai polis. Pemeriksaan kereta tersebut menjumpai 138.77g methamphetamine di dalam kotak pembesar suara. Perayu oleh itu dipertuduh di Mahkamah Tinggi kerana mengedar dadah berbahaya, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Berpuas hati bahawa pihak pendakwaan berjaya membuktikan, terhadap perayu, (i) elemen milikan dan pengetahuan dadah tanpa membangkitkan anggapan bawah s. 37(d) Akta; dan (ii) pengedaran melalui anggapan bawah s. 37(da) Akta, perayu dipanggil membela diri. Dalam pembelaannya, perayu menghujahkan bahawa dia menyewa kereta tersebut kerana ingin ke Kuala Lumpur untuk berjumpa seorang bernama Encik Goh. Pada penutup perbicaraan, Hakim Mahkamah Tinggi ('HMT') memutuskan bahawa perayu gagal (i) membangkitkan keraguan munasabah atas kes pihak pendakwaan; dan (ii) menyangkal anggapan pengedaran bawah s. 37(da) Akta. Perayu kemudiannya disabitkan atas kesalahan dan dijatuhkan hukuman mati. Maka timbul rayuan ini. Isu penting bagi pertimbangan mahkamah adalah sama ada milikan berjaya dibuktikan dan sama ada berdasarkan keterangan, paling tidak, ini adalah kes milikan dan bukan pengedaran. Perayu menghujahkan bahawa (i) HMT menyimpulkan pengetahuan tentang kewujudan dadah berdasarkan fakta bahawa tiada keterangan yang menunjukkan orang lain mempunyai akses terhadap kereta tersebut; dan (ii) pengetahuan tidak boleh disimpulkan kerana (a) tiada keterangan bahawa perayu yang menyimpan kotak pembesar suara dalam kereta tersebut; (b) keterangan forensik seperti DNA atau cap jari tidak dikemukakan untuk mencadangkan perayu mempunyai sentuhan fizikal atas isi kandungan kotak pembesar suara tersebut; dan (c) bungkusan dadah tersebut tersembunyi daripada mata kasar kerana disorokkan dalam kotak pembesar suara.

Diputuskan (membenarkan rayuan)
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Jagaan dan kawalan sahaja tidak cukup untuk membuktikan milikan bawah Akta. Mesti terdapat bukti bahawa perayu mempunyai pengetahuan akan dadah tersebut. Kecuali jika perayu mengaku mempunyai pengetahuan tentang dadah tersebut, pengetahuan boleh disimpulkan berdasarkan fakta dan hal keadaan yang terbukti. Apa yang membentuk milikan bawah Akta adalah persoalan undang-undang. Walau bagaimanapun, sama ada milikan telah dibuktikan dalam satu-satu kes adalah persoalan fakta.

(2) Dadah tersebut disembunyikan dalam kotak pembesar suara dan sedikit usaha diperlukan untuk membuka kotak tersebut untuk mengetahui apa yang terkandung di dalamnya. Oleh itu, cara yang lebih sesuai untuk menyimpulkan pengetahuan adalah melalui bangkitan anggapan bawah

s. 37(d) Akta. Walau bagaimanapun, pihak pendakwaan tidak mengemukakan fakta matrik untuk menyimpulkan bahawa perayu mempunyai pengetahuan dadah dalam kotak pembesar suara. Hakim Mahkamah Tinggi terkhilaf dalam dapatan beliau bahawa perayu mempunyai pengetahuan tentang dadah melalui inferens dan hal keadaan kes.

(3) Hakim Mahkamah Tinggi berpandangan bahawa dalam kes-kes anggapan pengedaran terpakai, tindakan terang-terangan tidak perlu dibuktikan. Sebetulnya, tindakan terang-terangan akan dilihat walaupun anggapan bawah s. 37(da) Akta dibangkitkan. Kewujudan tindakan terang-terangan sentiasa relevan dalam mempertimbangkan isu pengedaran. Keperluan tindakan terang-terangan untuk membentuk pengedaran selari dengan definisi 'pengedaran' bawah s. 2 Akta yang sangat luas. Sama ada satu-satu tindakan terang-terangan melangkaui milikan pasif bergantung pada fakta dan hal keadaan satu-satu kes. Dalam kes ini, fakta dan hal keadaan tidak menunjukkan tindakan terang-terangan oleh perayu. Fakta utama mendedahkan perayu sekadar duduk dalam kereta tersebut semasa ditangkap; tidak lebih. Tiada tindakan melarikan diri atau percubaan melarikan diri, pergelutan atau percubaan merasuah. Jumlah dadah yang terlibat juga bukanlah luar biasa besar. Pendek kata, tiada tindakan terang-terangan yang menunjukkan pengedaran.

(4) Hakim Mahkamah Tinggi sepatutnya membangkitkan anggapan bawah s. 37(d) Akta dan memanggil perayu membela diri bagi pertuduhan terpinda iaitu milikan bawah s. 12(2) Akta dan bukan pengedaran. Akibatnya, anggapan pengedaran tidak boleh dijadikan sandaran lagi untuk membuktikan pengedaran. Dalam apa-apa jua keadaan, hanya terdapat keterangan milikan pasif oleh perayu. Mempertimbangkan keseluruhan keterangan, perayu gagal, atas imbangan kebarangkalian, menyangkal anggapan milikan dan pengetahuan. Sabitan dan hukuman mati oleh Mahkamah Tinggi diketepikan dan diganti dengan sabitan bawah s. 12(2), yang boleh dihukum bawah s. 39A(2) Akta. Perayu dijatuhkan hukuman 20 tahun penjara dan sepuluh kali sebatan.

Case(s) referred to:

Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Fakhrurrazi Hasan v. PP [2017] 2 CLJ 125 FC ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
Ooi Hock Kheng v. PP [2014] 1 LNS 685 CA ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(dist)***
PP v. Hairul Din Zainal Abidin [2001] 6 CLJ 480 HC ***(refd)***
PP lwn. Haling Arala Jimjani [2008] 4 CLJ 163 CA ***(refd)***

A *PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC* ***(refd)***
R v. Kelly (1992) 92 DLR (4th) 643 (SCC) ***(refd)***
Soorya Kumar Narayanan & Anor v. PP [2012] 9 CLJ 141 FC ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***
Y Jeyamuraly Yesiah v. PP [2007] 5 CLJ 605 CA ***(refd)***
Zaruna Yusoff lwn. PP [2016] 2 CLJ 258 CA ***(refd)***

B **Legislation referred to:**
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), (da), 39A(2), 39B(1)(a), First Schedule

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Jasmee Hameeza Jaafar; DPP

C *[Editor's note: For the High Court judgment, please see PP lwn. Sia Swee Siong & Satu Lagi [2016] 1 LNS 610 (overruled).]*

Reported by Najib Tamby

D **JUDGMENT**

Harmindar Singh Dhaliwal JCA:

[1] The appellant was charged together with his wife, Sim Yock Kim, in the High Court at Melaka for an offence under s. 39B(1)(a) of the Dangerous E Drugs Act 1952 ("the Act"). The charge read as follows:

> Bahawa kamu bersama-sama pada 09.12.2013 jam lebih kurang 4.00 pagi, di Petronas Ayer Keroh 3, Lebuh Ayer Keroh, di dalam Daerah Alor Gajah, di dalam Negeri Melaka, bagi mencapai niat bersama kamu telah didapati mengedar dadah berbahaya jenis Methamphetamine seberat F 138.77 gram. Oleh itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Kesiksaan.

[2] After a trial, the wife of the appellant, Sim Yock Kim, was acquitted G at the end of the defence case. The appellant was however found guilty of the offence and sentenced to death by the High Court. The appellant then filed an appeal to this court. The appeal was heard on 2 February 2017. At the conclusion of the submissions, we allowed the appeal and set aside the conviction and death sentence passed by the High Court. Substituted in its place was a conviction under s. 12(2) and punishable under s. 39A(2) of the H Act. The appellant was sentenced to 20 years' imprisonment with effect from date of arrest. Our reasons for doing so now follow. This is now the judgment of the court.

The Case For The Prosecution

I **[3]** The factual matrix of the case falls within a narrow compass. On 9 December 2013, SP6 (Insp Mohd Fazrullzham bin Asli) and his police party had detained a Toyota Camry (the Toyota) bearing registration number

WYU 5377 which was parked at the Petronas Ayer Keroh 3, Lebuh Raya, Ayer Keroh, Melaka. At the wheels was the appellant whilst his wife was seated on the front passenger seat.

[4] Both the appellant and his wife together with the Toyota were brought to the Polis Station at Durian Tunggal. An examination of the Toyota was then done. From its boot, SP6 recovered a speaker with the brand name "BM" (P7). Inside the speaker SP6 found the following items:

(i) ten transparent plastic packets containing substances suspected to be drugs;

(ii) one transparent plastic packet containing two pills suspected to be ecstasy;

(iii) two aluminium strips containing two pills suspected to be eramin 5 and one aluminium strip with one pill suspected to be eramin 5;

(iv) one cellotaped brown coloured envelope;

(v) one transparent plastic packet containing substances suspected to be drugs; and

(vi) four packets of aluminium foil containing substances suspected to be drugs.

[5] The contents were sent for chemical analysis. Puan Azmira binti Abd Rahman (SP2), a chemist attached to the Jabatan Kimia Malaysia, confirmed the said substances to be methamphetamine weighing 138.77g which formed the subject matter of the charge. Methamphetamine is listed in the First Schedule of the Act.

[6] It was also revealed in the evidence that the said Toyota was purchased in August 2013 and the registered owner was one Dato' Johari bin Maarof (SP4). SP4 claimed that he had surrendered the car to one Na'im bin Jusri (SP8) to be used for the car rental business run by SP8 and his partner Mohd Afendi bin Aman (SP3). SP3 testified that he rented out the Toyota to the appellant and his wife for a period of one month from 25 November 2013 until 25 December 2013. SP3 received payment of RM8,000 as the rental payment together with a deposit of RM1,000 for which an invoice (exh. P25) was issued in the name of the appellant's wife. SP3 also told the court that before he released the car, he had carried out an inspection and he found nothing in the car including the speaker with the brand name "BM" (exh. P7) and the drugs inside it.

[7] At the end of the prosecution case, the learned trial judge found that the element of possession coupled with knowledge of the illicit drugs had been proved against the appellant and his wife without the need for the

invocation of the presumption under s. 37(d) of the Act. The reasons for so doing appeared in paras. 21 to 27 of the learned judge's grounds of judgment as follows:

> [21] Berdasarkan keterangan oleh SP3 adalah jelas bahawa semasa kereta tersebut sebelum diserahkan kepada OKT-OKT, SP3 telah memeriksa kereta dan tidak ada speaker di dalam kereta tersebut.
>
> [22] Keterangan SP3 bahawa OKT1 dan OKT 2 telah memaklumkan SP3 bahawa tujuan kereta tersebut disewa adalah kerana kereta OKT1/2 rosak tidak dicabar oleh pihak Pembela. Apa yang dicabar hanyalah bahawa tidak ada pemeriksaan dibuat sebelum kereta diserahkan kepada OKT-OKT.
>
> [23] Sebagai pemilik kereta, sudah tentu SP3 tidak mahu barangan peribadi beliau berada dalam kereta yang akan disewakan kepada pelanggan. SP3 telah memeriksa bahagian dalam kereta dashboard dan sebagainya. Kereta tersebut juga diperiksa untuk menunjukkan bahawa ianya dalam keadaan baik. Jika terdapat calar akan ditulis di invoice. Sekiranya penyewa guna dan ada kerosakan pada kereta, SP3 akan caj balik kos membaiki kerosakan tersebut pada penyewa. Harus diingat bahawa walaupun kos sewa kereta adalah RM8000.00 sebulan, penyewa juga perlu membayar deposit sebanyak RM1000.00. Saya mempercayai keterangan SP3 berhubung isu pemeriksaan ini. Ini adalah kali pertama SP3 berjumpa dan berurusan dengan OKT-OKT. Tidak ada sebab untuk SP3 menganiayai OKT-OKT.
>
> [24] Saya juga mendapati bahawa tidak terdapat sebarang cadangan oleh pihak Pembela bahawa OKT-OKT ada menghubungi SP3 dan/atau SP8 untuk memaklumkan bahawa terdapat speaker di dalam kereta yang disewakan.
>
> [25] Berpandukan fakta bahawa kereta tersebut telah disewakan oleh SP3 kepada OKT-OKT pada 25/11/2013 manakala tarikh OKT-OKT ditahan bersama kereta tersebut adalah pada 9/12/2013, ini bermakna bahawa kereta tersebut telah digunakan oleh OKT-OKT selama 2 minggu.
>
> [26] Elemen milikan yang turut memerlukan bahawa OKT-OKT mempunyai pengetahuan bahawa terdapatnya dadah berbahaya dalam kereta tersebut, tidak semestinya dibuktikan melalui keterangan langsung. Ianya juga boleh dibuktikan melalui inferens berdasarkan keterangan yang telah dikemukakan.
>
> [27] Tidak terdapat sebarang keterangan yang menunjukkan bahawa terdapat orang lain yang menggunakan kereta tersebut dalam tempoh 2 minggu kereta tersebut digunakan oleh OKT-OKT tersebut. Dalam keadaan sedemikian, saya membuat inferens bahawa OKT-OKT sepanjang masa tahu tentang dadah yang tersorok dalam speaker yang dijumpai oleh SP6 di dalam "boot" kereta.

[8] On the element of trafficking, the learned trial judge found that the prosecution had proved trafficking with the aid of the presumption in s. 37(da) of the Act. The learned judge also found that the element of common intention was proved on the evidence as both the appellant and his wife were together at the material time when renting the car and also when the incriminating drugs were found. The learned judge found that a *prima facie* case had been made out against the appellant and his wife on the charge. Accordingly, the appellant and his wife were ordered to enter their defence.

The Defence Case

[9] The appellant and his wife chose to give evidence on oath. There were no other witnesses. Their evidence was well summarised by the learned judge as follows:

(a) OKT1 telah bekerja sebagai "broker" lebih kurang 10 tahun dan memperolehi pendapatan tidak tetap bergantung kepada jualan. Purata pendapatan bulanan sebanyak RM5,000.00 ke RM6,000.00.

(b) OKT2 pula merupakan seorang suri rumah sepenuh masa yang setiap hari menguruskan hal ehwal anak-anak yang bersekolah.

(c) Tujuan OKT1 dan OKT2 menyewa kereta Toyota Camry untuk sementara adalah kerana mereka mempunyai hanya sebuah kereta Honda Civic dan OKT1 perlu menjalankan kerja sebagai broker yang melibatkan kawasan Muar, Johor Bahru, Seremban, Melaka dan sekeliling Kuala Lumpur. Manakala, OKT2 perlu menghantar anak-anak ke sekolah, tuition dan pergi ke pasar.

(d) Kedua-dua tertuduh mengaku telah menyewa kereta Toyota Camry di Shah Alam Selangor daripada SP3 bagi tempoh bermula daripada 25.11.2013 sehingga 25.12.2013. OKT2 telah membayar bayaran sewa RM8,000.00 dan bayaran deposit RM1,000.00 secara tunai kepada SP3. OKT2 mengaku menandatangani eksibit P25 semasa mereka mengambil kereta sewa Toyota Camry daripada SP3.

(e) OKT1 dan OKT2 menafikan fakta bahawa SP3 telah menjalankan pemeriksaan pada semua bahagian kereta termasuk bonet belakang kereta dan mendapati tiada apa-apa barang yang disimpan di dalam kereta tersebut termasuklah speaker jenama BM (eksibit P7) dan dadah yang dijumpai di dalam speaker tersebut sebelum SP3 menyerahkan kereta Toyota Camry tersebut kepada OKT1 dan OKT2.

(f) OKT1 mengaku membuka bonet belakang kereta Toyota Camry pada 26.11.2013 dan nampak sebuah pembesar suara (eksibit P7) berada di dalam bonet kereta tersebut.

(g) OKT1 mengambil invoice (eksibit P25) dan menelefon kedua-dua nombor handphone yang tertera di dalam P25 untuk bertanya speaker tersebut kepunyaan siapa tetapi tiada jawapan. Oleh itu, OKT1 memutuskan untuk memulangkan kereta dan speaker sebaik habis tempoh penyewaan.

A (h) OKT1 menyatakan kali pertama OKT1 melihat dadah-dadah yang dijumpai di dalam speaker adalah semasa ditunjukkan oleh polis di Perkarangan Balai Polis Durian Tunggal.

(i) OKT2 menyatakan tidak pernah mengendalikan atau menguruskan kereta Toyota Camry dari mula tarikh sewa hinggalah pada
B 9.12.2013 melainkan OKT2 menjadi penumpang semasa OKT1 membawa kereta Toyota Camry ke Kuala Lumpur pada 8.12.2013 kerana OKT1 ada perbincangan dengan Mr Goh di Kuala Lumpur.

(j) OKT1 dan OKT2 menyatakan pihak polis telah menjalankan pemeriksaan badan ke atas OKT1 dan kereta Toyota Camry semasa OKT1 dan OKT2 ditahan di Petronas Ayer Keroh 3.
C

Findings Of The High Court

[10] At the conclusion of the trial, the learned judge found the explanation of the appellant in denying any knowledge of the drugs in the incriminating speaker to be improbable. The story of the appellant going to Kuala Lumpur
D to see one Mr Goh was suspicious as nothing of this nature was informed to the investigating officer. No such evidence was adduced and no documents relating to any land transaction were found in the car to support the appellant's story.

E **[11]** The learned judge found that the appellant had failed to cast a reasonable doubt on the case for the prosecution. The appellant had also failed to rebut the presumption of trafficking under s. 37(da) of the Act. The judge also found that a case beyond reasonable doubt had been made out against the appellant on the offence with which he was charged. The appellant was accordingly convicted and sentenced to death.

F **[12]** The appellant's wife, on the other hand, was able to raise a reasonable doubt as to her knowledge of the illicit drugs. The learned judge found that it would be unsafe to convict her on the charge. She was accordingly acquitted and discharged.

G **The Instant Appeal**

[13] Before us, although the petition of appeal contained several grounds, counsel for the appellant submitted that the only issue to be canvassed on appeal was whether possession had been proved and whether on the evidence, at its highest, it was a case of possession and not trafficking.

H **[14]** In this respect, it was argued by learned counsel for the appellant that the learned trial judge erred when he found that possession had been proved based on the circumstances set out in his judgment. In essence, the learned trial judge had inferred knowledge of the presence of drugs primarily based on the fact that there was no evidence that others had access to the Toyota.

I

[15] On this question, it was contended that it can equally be argued that knowledge cannot be inferred for the following reasons: A

(i) No evidence that it was the appellant who kept the speaker box in the boot of the Toyota although he had rented the car;

(ii) No forensic evidence was adduced, for example, DNA or fingerprints liftings, to suggest or prove that the appellant had come into physical contact with the contents inside the speaker; and B

(iii) The packages of drugs were hidden from the naked eye in that they were concealed in the speaker box.

[16] Now the law with regards to possession and knowledge is trite in that mere custody and control is not sufficient to prove possession under the Act. There must be proof that the appellant had knowledge of the illicit drugs. Unless the accused person confesses to knowledge of the illicit drugs, knowledge can only be inferred from proved facts and circumstances (see *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237; *Wong Nam Loi v. PP* [1998] 1 CLJ 37; *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337; [2007] 4 AMR 269; *Parlan Dadeh v. PP* [2009] 1 CLJ 717; *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597 and *Fakhrurrazi Hasan v. PP* [2017] 2 CLJ 125). C D

[17] It is also trite that what constitutes possession under the Act is a question of law. However, whether possession has been proved in a given case is a question of fact. The facts and circumstances which are relied upon to prove possession can vary from case to case such that an over reliance and fixated approach on the facts of other cases can lead to confusion and sometimes error. E

[18] The crucial issue in this appeal is whether the learned trial judge was entitled to come to a finding that the appellant had knowledge of the illicit drugs based purely on the surrounding facts and circumstances. In this context, the learned trial judge relied on the case of *PP v. Abdul Rahman Akif*, *supra*, when he said: "Dalam membuat keputusan sama ada OKT-OKT mempunyai milikan ke atas dadah yang dijumpai, saya dipengaruhi oleh keputusan Mahkamah Persekutuan dalam kes *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337". F G

[19] In *Abdul Rahman Akif*, *supra*, the brief facts were these. Three packages of drugs of cannabis were found in the car driven by the accused. They were all wrapped in newspapers. One package was under the driver's seat whilst two were under the front passenger's seat. The net weight of the cannabis was 4826.9g. The High Court found that there was possession based on the confession of the accused in his cautioned statement. On appeal, the Court of Appeal decided that the trial judge ought not to have admitted the H I

A cautioned statement into evidence. The court held that the charge of trafficking could not be sustained. The conviction and sentence was set aside and substituted with conviction for the offence of possession.

[20] On appeal to the Federal Court, it was held that the Court of Appeal was right to invoke the s. 37(d) presumption of the Act. In this context,
B Arifin Zakaria FCJ (now Chief Justice), speaking for the Federal Court observed (at p. 280):

> It is true that the trial judge did not make any finding on the issue of knowledge necessary to establish possession of the drugs, as he relied on the cautioned statement in coming to his finding. The Court of Appeal
C on the facts correctly found that there was sufficient evidence to find the respondent to be in custody and control of the 3 packages found in the car and relying on the presumption under s. 37(d) of the Act the Court of Appeal went on to hold that the respondent was in presumed possession of the drug.

D **[21]** However, what is pertinent is that the Federal Court went on to say that from the evidence it was clear that, from the manner the drugs were hidden, little effort was required to uncover what were in the three packages and as such it was held that possession was proven independent of the s. 37(d) presumption.

E **[22]** Reverting to the instant case, we agree with learned counsel for the appellant that the facts are clearly distinguishable. Unlike the case of *Abdul Rahman Akif*, the drugs in the instant case were hidden in a speaker box and some effort would be required to open up the box to determine what was inside it. As such, we agree that the more appropriate way to impute
F knowledge was through the use of the s. 37(d) presumption. Take this scenario for instance. If A hands to B a speaker box and B keeps the speaker box in the boot of his car. If it is required that one needs to open the speaker box to ascertain its contents, then it would be reasonable for B to say that he had no knowledge of its contents. Under such circumstance, the only way
G to fasten knowledge on B is through the 37(d) presumption. It is fair to say that a speaker box on its own would not attract suspicion that it contained illicit drugs.

[23] In the circumstances, we agree that there was no factual matrix adduced by the prosecution to infer that the appellant had knowledge of the
H illicit drugs in the speaker box. The upshot is that the learned judge erred in finding that the appellant had knowledge of the drugs by way of inferences and from the circumstances of the case. We accept that the appropriate way to prove knowledge in the present case was to invoke the knowledge presumption under s. 37(d) of the Act (see *PP v. Tan Tatt Eek* [2005] 4 CLJ
I 460; [2005] 6 AMR 543 and *Soorya Kumar Narayanan & Anor v. PP* [2012] 9 CLJ 141).

[24] On the next issue concerning whether the evidence was sufficient to prove an offence of trafficking, it was submitted that the learned trial judge had failed to appreciate that this was a case of possession at best as there was no evidence of trafficking. The learned trial judge appeared to take the view that in cases where the presumption of trafficking is applied, no overt act needs to be proved relying again on the case of *Abdul Rahman Akif*.

[25] With respect, we are unable to find any such statement of law in the case of *Abdul Rahman Akif*. To the contrary, the law journals are replete with authorities which assert that the courts will look into the "overt act" even when the presumption under s. 37(da) has been invoked. One such case was the decision of this court in *Zaruna Yusoff lwn. PP* [2016] 2 CLJ 258; [2016] 1 MLJ 860, a decision which was later affirmed by the Federal Court. In that case, when the accused was arrested she had a handbag with her. An examination of the handbag revealed that there were a total 50 plastic bottles containing a net weight of 54.72g of heroin. The trial court had invoked the presumption of trafficking under s. 37(da) of the Act. She was convicted of trafficking and sentenced to death. On appeal, this court held that it was a case of passive possession and one of the reasons was that there was no overt act of trafficking. Speaking for the court, Mohtarudin Baki JCA said (at p. 265 (CLJ); p. 867 (MLJ)):

> [13] Kami juga mendapati tiada keterangan langsung berhubung suatu 'overt act' di pihak perayu untuk membuktikan kesalahan pengedaran dadah berbahaya. Perbuatan 'overt act' untuk membuktikan pengedaran telah di jelaskan oleh Lord Diplock di dalam kes *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64 seperti berikut:
>
> ... it must mean moving the drugs from one place to another, it may mean moving them also to another person, but it need not do so.

[26] Another case was *Y Jeyamuraly Yesiah v. PP* [2007] 5 CLJ 605. The brief facts were as follows. The accused was standing near a biscuit tin near a rubbish dump. When confronted by police officers, the accused ran but was arrested. When questioned whether he had anything illegal the accused then handed over the biscuit tin containing the various packets of drugs. The learned trial judge too, invoked the presumption under s. 37(da) of the Act. On the issue of absence of overt act, the majority, speaking through Mohd Ghazali Yusoff JCA (as he then was), said (at pp. 635-636):

> [54] The evidence clearly showed that the said biscuit tin which contained the said dangerous drugs was in custody and under the control of the appellant. This is what is termed as passive possession in several authorities. That the appellant had knowledge of the said dangerous drugs in the said biscuit tin has to be inferred from the circumstances as discussed earlier. We find that the evidence showed that he had knowledge. But to constitute trafficking under s. 39B(l) of the Act, there

must be *mens rea* possession accompanied by some overt act. We find no such evidence in this instant appeal. Further, we cannot use the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) of the Act as has been decided in *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170 (see also *Pendakwa Raya v. Tan Tatt Eek* [2005] 1 CLJ 713).

[27] We should add that the presence or otherwise of an "overt act" is always relevant when considering the issue of trafficking. In this respect, the leading case is the Privy Council decision in *Ong Ah Chuan v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64 where Lord Diplock, in delivering the judgment of the board, observed (at p. 68):

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking under section 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in paragraph (a) of the definition of 'traffic' and 'trafficking' in section 2. Even apart from any statutory definition, the ordinary meaning of the verb 'to traffic, in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. This concept, involving transfer of possession, is reflected in the statutory definition itself.

[28] What this means is that the requirement of an overt act to constitute trafficking is consistent with the definition of "trafficking" in s. 2 of the Act which is very wide as it includes the following: manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing. It was for this reason that the Federal Court in *PP v. Abdul Manaf Muhammad Hassan* [2006] 2 CLJ 129; [2006] MLRA 319 observed that "the mere act of carrying is not sufficient to constitute the offence of trafficking". This was despite the definition of "trafficking" in s. 2 of the Act which included "carrying". Similarly in *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65; [2003] 2 MLJ 241, this court said: "… the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker".

[29] So in essence, there must be a distinguishing factor which separates the offence of possession from that of trafficking. It is hard to imagine someone who is merely keeping illicit drugs without more to be termed a trafficker. So a person who is found "keeping" 1g of methamphetamine could not have been contemplated by Parliament to be a trafficker within the meaning under the Act. In this context, it is trite that penal statutes must be construed strictly (see *R v. Kelly* (1992) 92 DLR (4th) 643 (SCC) as applied in *PP v. Hairul Din Zainal Abidin* [2001] 6 CLJ 480; [2001] 6 MLJ 146). More so when the death

penalty is involved. In the final analysis, whether there is an overt act which goes beyond passive possession, depends on the facts and circumstances of a particular case. Some of the factors to consider would be the amount of drugs involved or evidence of sale or intended sale of illicit drugs or evidence of drugs being brought from a foreign country into our own. There cannot be an exhaustive list due to the myriad of circumstances in which illicit drugs are discovered.

[30] It may however be instructive to allude to some examples. In *Ooi Hock Kheng v. PP* [2014] 1 LNS 685; [2014] 5 MLJ 585, the accused was arrested while carrying a bag which contained a brown paper package later confirmed by the chemist to contain 476.65g of ketamine. Delivering the judgment of this court, Azahar Mohamed JCA (now FCJ) observed as follows:

> [11] In our judgment, at the highest, this was a case of passive possession and not trafficking. The evidence shows that the appellant was in possession of the ketamine. This is an undisputable fact. The conduct of disposing the plastic bag, the acts of flight and struggle only show that the appellant had knowledge of the contents of the bag to be ketamine. The learned JC erred in that he failed to appreciate that other than an act of passive possession, there was no overt act on the part of the appellant to traffic the impugned drugs.

[31] Similarly in *PP lwn. Haling Arala Jimjani* [2008] 4 CLJ 163, 193.76g of methamphetamine was found in a small packet which was contained in a small bag the accused was carrying. The Federal Court, through the judgment of Abdull Hamid Embong, upheld the decision of the trial court and observed that the accused was only in passive possession of the impugned drugs.

[32] Coming back to the instant case, the facts and circumstances reveal no overt act on the part of the appellant. The primary facts show that the appellant was merely seated in the Toyota car when he was arrested. There was nothing beyond that. There was no conduct of flight or attempted flight, no conduct of struggle or attempted bribe. The amount of drugs involved was not unusually large. In short, there was no overt act to show trafficking.

Conclusion

[33] In the circumstances, and for the reasons we have provided, the learned judge ought to have invoked the presumption under s. 37(d) of the Act and called upon the appellant to enter his defence only on an amended charge of possession under s. 12(2) of the Act and not trafficking. As a consequence, the presumption of trafficking under s. 37(da) could no longer be relied upon to prove trafficking. In any event, as we had alluded to earlier, there was only evidence of passive possession on the part of the appellant. Considering the entirety of the evidence, the appellant had failed, on a balance of probability, to rebut the presumption of possession and knowledge.

[34] Accordingly, we had set aside the conviction and death sentence of the High Court, and substituted it with a conviction under s. 12(2) punishable under s. 39A(2) of the Act. After hearing the mitigation of the appellant and the reply by the learned Deputy Public Prosecutor, we sentenced the appellant to 20 years' imprisonment with effect from the date of his arrest and ten strokes of whipping.